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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services

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DATE: **MAY 09 2012** OFFICE: TEXAS SERVICE CENTER

FILE



IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act; 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on September 22, 2010, and is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate “sustained national or international acclaim” and present “extensive documentation” of his or her achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific evidence. 8 C.F.R. §§ 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, the petitioner claims to meet at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available ... to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been

¹ The AAO notes that Form I-290, Notice of Appeal or Motion, was filed and signed by the petitioner. Although the petitioner was represented by [REDACTED] regarding his Form I-140, Immigrant Petition for Alien Worker, there is no evidence that [REDACTED] is involved with the filing of this appeal. Moreover, the appeal was not filed with a new and properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, as required pursuant to the regulation at 8 C.F.R. § 292.4(a). As such, [REDACTED] is not recognized as the attorney of record for this proceeding.

demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.² With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

² Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

II. ANALYSIS

A. Evidentiary Criteria³

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

In the director's decision, he determined that the petitioner failed to establish eligibility for this criterion. In the petitioner's brief submitted on appeal, he did not contest the findings of the director for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

Accordingly, the petitioner failed to establish that he meets this criterion.

Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

The director determined that the petitioner established eligibility for this criterion. Based on a review of the record of proceeding, the AAO must withdraw the decision of the director for this criterion. The petitioner submitted the following documentation:

1. An article entitled, [REDACTED], August 2010, by [REDACTED], [REDACTED] *Reviews Molecular Cell Biology*;
2. An article entitled, [REDACTED], September 2008, by [REDACTED], [REDACTED] *Reviews Molecular Cell Biology*;
3. An article entitled, [REDACTED], July 2010, by [REDACTED], [REDACTED], *Nature Structural & Molecular Biology*;

³ On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

4. An article entitled, [REDACTED] in the Nucleus,” July 25, 2008, by [REDACTED] *Science*;
5. An article entitled, [REDACTED]” June 24, 2010, unidentified author, *Nature*;
6. An article entitled, [REDACTED]” July 25, 2008, unidentified author, *Science*;
7. An article entitled, [REDACTED] August 28, 2008, unidentified author, *NewsRx*;
8. An article entitled, [REDACTED] December 5, 2005, unidentified author, *NewsRx*;
9. A screenshot regarding comments for an article entitled, [REDACTED] [REDACTED] unidentified date, unidentified author, www.fl000biology.com; and
10. A screenshot regarding comments for an article entitled, [REDACTED]” unidentified date, unidentified author, www.fl000biology.com.

The petitioner also submitted a letter from Dr. Ailong Ke who stated:

First, citations simply reference an individual’s work. Articles citing an individual’s work are primary [sic] about the author’s own work, but not the individual’s work. [The petitioner] has identified two new genes, *nrde-2* and *nrde-3*, in *Nature* 2010 and *Science* 2008. Although the two reports by [REDACTED] mentioned [the petitioner’s] name as [REDACTED] once in each article, they have mentioned “*nrde-2*” eleven time times and “*nrde-3*” twenty-seven times throughout the whole articles respectively. Both of these two reports by Arianne Heinrichs have refereed only [the petitioner’s] work at the end of each article.

Second, the two reports didn’t mention any other researchers’ or the author [REDACTED] research work, indicating that the two articles written by [REDACTED] *Nature Reviews Molecular Cell Biology* 11, 539-539 (30 June 2010) and *Nature Reviews Molecular Cell Biology* 9, 666-666 (13 August 2008), are not research citations that simply cited [the petitioner’s] work, but as reports on [the petitioner’s] breakthrough discoveries.

Although in the director's decision he indicated that [REDACTED] statements demonstrated the petitioner's eligibility for this criterion, the documentary evidence submitted by the petitioner is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) that requires "[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought." In other words, the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be "about" the petitioner relating to his work. Compare 8 C.F.R. § 204.5(i)(3)(i)(C) relating to outstanding researchers or professors pursuant to section 203(b)(1)(B) of the Act, which only requires "[p]ublished material in professional publications written by others about the alien's work in the academic field."

In the case here, none of the items listed above reflect published material about the petitioner relating to his work. Instead, as correctly stated by Dr. Ke, the articles report on the findings of the petitioner's research; the articles reflect no discussion "about" the petitioner. The articles simply credit the petitioner as one of the authors of the research. Again, while the AAO does not dispute that the articles are about the petitioner's research, the documentary evidence submitted by the petitioner does not meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) that requires "published material *about the alien* . . . relating to the alien's work in the field [emphasis added]." As such, the AAO withdraws the decision of the director for this criterion. While the articles are not relevant to this criterion, they will be considered below as they relate to the significance of the petitioner's original contributions under the regulation at 8 C.F.R. § 204.5(h)(3)(v).

Accordingly, the petitioner failed to establish that he meets this criterion.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

In the director's decision, he determined that the petitioner failed to establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field." Here, the evidence must be reviewed to see whether it rises to the level of original scientific or scholarly-related contributions "of major significance in the field." The phrase "major significance" is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) quoted in *APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

As indicated above, the petitioner authored articles that were published in *Nature* ("Small Regulatory RNAs Inhibit RNA Polymerase II During the Elongation Phase of Transcription") and *Science* ("An Argonaute Transports siRNAs from the Cytoplasm to the Nucleus"). On appeal, the petitioner claims that "without remarkable scientific originality and advances, a researcher's work will not be published by these two most prestigious professional journals." While publication of one's research in *Nature* or *Science*, as well as any other professional publication, generally demonstrates the petitioner's original contributions in the form of original research and findings, the

AAO is not persuaded that every research article published in *Nature* or *Science* signifies an original contribution of *major significance* in the field. Furthermore, the regulations contain a separate criterion regarding the authorship of scholarly articles. 8 C.F.R. § 204.5(h)(3)(vi). The AAO will not presume that evidence relating to or even meeting the scholarly articles criterion is presumptive evidence that the petitioner also meets this criterion. To hold otherwise would render meaningless the regulatory requirement that a petitioner meet at least three separate criteria. Therefore, while the petitioner's scholarly articles will not be considered under this criterion, they will be addressed under the next criterion. However, the scholarly articles are relevant to the criterion with regard to the impact they have had on the field which is demonstrated by citations or other documentary evidence.

According to the screenshots submitted by the petitioner from *ISI Web of Knowledge* and *Google Scholar*, the *Science* article has never been cited by others in their own work. The AAO notes that the article was published in June 2010, approximately one month prior to the filing of the petition. Regarding the *Nature* article, it has been cited about 25 times at the time of the filing of the petition. The petitioner also submitted citations regarding eight other articles reflecting approximately 43 citations by others. The petitioner's article entitled, [REDACTED]

[REDACTED] was cited 25 times with the petitioner's remaining articles cited between zero and nine times.

While the number of total citations is a factor, it is not the only factor to be considered in determining the petitioner's eligibility for this criterion. Generally, the number of citations is reflective of the petitioner's original findings and that the field has taken some interest to the petitioner's work. However, it is not an automatic indicator that the petitioner's work has been of *major significance in the field*. In the case here, the AAO is not persuaded that the petitioner's highest cited articles of 25 times each are reflective that the petitioner's work has been of major significance in the field. Merely submitting documentation reflecting that the petitioner's work has been cited by others in their published material is insufficient to establish eligibility for this criterion without documentary evidence reflecting that the petitioner's work has been of a major significance in the field. The AAO is not persuaded that the moderate citations of the petitioner's articles are reflective of the significance of his work in the field, including zero citations for his *Science* article and 25 citations for his *Nature* article. The petitioner failed to establish how those findings or citations of his work by others have significantly contributed to his field as a whole.

The petitioner's evidence also includes documentation that he has presented his findings at a few college-sponsored seminars such as at Florida State University, the University of British Columbia, and Nanyang Technological University, and at a few scientific conferences and symposia such as at the Keystone Symposia, the 17th International C. Elegans Meeting, and the 12th Annual Meeting of the RNA Society. Many professional fields regularly hold conferences and symposia to present new work, discuss new findings, and to network with other professionals. These conferences are promoted and sponsored by professional associations, businesses, educational institutions, and government agencies. Participation in such events, however, does not equate to an original

contribution of major significance in the field. There is no evidence showing that the petitioner's conference presentations have been frequently cited by independent researchers or have otherwise significantly impacted the field.

Again, while the presentation of the petitioner's research demonstrates that his work was shared with others and may be acknowledged as original contributions based on the selection of them to be presented, the AAO is not persuaded that presentations of the petitioner's work at several venues are sufficient evidence establishing that his work is of major significance to the field as a whole and not limited to the engagements in which they were presented. The petitioner failed to establish that the presentations were of major significance so as to establish their impact or influence beyond the audience at the conferences.

As mentioned under the published material criterion, the petitioner submitted several articles that reported on the petitioner's research and authored material. Again, while the articles demonstrate the petitioner's original contributions through his research and findings, they fall short in establishing that they have already been of major significance in the field. In fact, the articles speculate on the possible implications of the petitioner's research. For example, regarding item 3 from the published material discussion, the article states:

Although it is not yet clear that Rbp7 is involved in RNAi, both NRDE-2 and NRDE-3 interact with pre-mRNAs, hinting at a co-transcriptional function. . . . Further investigation will elucidate the mechanism of silencing in this system as well as whether nrde-2 and nrde-3 are directly involved, and it will be interesting to see whether the homologs of nrde-2 in other species are involved in a similar process.
[emphasis added]

Similarly, regarding item 4 from the published material discussion, the article states:

Because the Argonaute protein Ago2 is the only known endonuclease among the human Argonaute proteins, it is very *likely* that Ago2 mediates nuclear RNAi in human cells. How are human Ago2 and *C. elegans* NRDE-3 imported into the nucleus, and how are these importing pathways regulated? *Further study* in this direction *will* not only lead to a better understanding of the mechanisms underlying nuclear RNAi, but *will* also show new ways of improving RNAi as a tool for research and therapy.
[emphasis added]

While these articles, as well as the other articles submitted by the petitioner, report on the petitioner's research immediately after they were published in *Nature* and *Science*, there is no evidence reflecting that the petitioner's contributions have already impacted or influenced the field in a significant manner. The articles discuss by far the possible implications that may lead to further research rather than how the research can already be considered as an original contribution of major significance in the field.

Likewise, the petitioner submitted several recommendation letters that speculate on the future promise of the petitioner's work instead of indicating how it has already been of major significance in the field. For instance, ██████████ stated that the petitioner's "research *could* help to design anti-virus small RNA drugs that are more stable and more powerful [emphasis added]." Moreover, ██████████ stated that the petitioner's "research *will* benefit the health care industry in the United States [emphasis added]," and the petitioner "*will* be able to contribute greatly to the field of drug discovery [emphasis added]." Furthermore, ██████████ stated that the petitioner's "innovative work provides a *potential* drug target for cancer diagnosis [emphasis added]," and "[t]hese double strand RNA hold great *potential* in treating genetic disorders [emphasis added]." In addition, ██████████ stated that the petitioner's "work *may* permit clinicians to administer a single dose of a particular small RNAs to stably shut down a gene [emphasis added]," and the petitioner's "research *may* enable the therapeutic use of small RNAs in treating human maladies like cancer and cardiovascular disease [emphasis added]."

A petitioner cannot file a petition under this classification based on the expectation of future eligibility. Given the descriptions in terms of future applicability and determinations that may occur at a later date, it appears that the petitioner's research, while original, is still ongoing and that the findings he has made are not currently being implemented in his field. Again, while the AAO acknowledges the originality of the petitioner's findings, the letters do not indicate that anyone is currently applying the petitioner's research findings, so as to establish that these findings have already impacted the field in a significant manner. Accordingly, while the AAO does not dispute the originality of the petitioner's research and findings, as well as the fact that the field has taken some notice of his work, the actual present impact of the petitioner's work has not been established. Rather, the petitioner's references appear to speculate about how the petitioner's findings may affect the field at some point in the future. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Many of the letters proffered do in fact discuss far more persuasively the future promise of the petitioner's research and the impact that may result from his work, rather than how his past research already qualifies as a contribution of major significance in the field. The assertion that the petitioner's research results are likely to be influential is not adequate to establish that his findings are already recognized as major contributions in the field. While the experts praise the petitioner's research and work as both novel and of great potential interest, the fact remains that any measurable impact that results from the petitioner's research will likely occur in the future.

Further, the petitioner submitted recommendation letters that described the petitioner's original research but did not demonstrate that it was of major significance in the field. For example, ██████████ stated that the petitioner's "findings help shape the development of methods for effective small RNA drug delivery, and for evaluating the potency, stability and specificity of these drugs." However, ██████████ failed to identify which methods, if any, that have been developed as

a result of the petitioner's research, so as to demonstrate original contributions of major significance in the field. Likewise, [REDACTED] stated:

[The petitioner] identified certain viral elements [that] could bind cellular factors of the human host and mediate their own gene expression. He was also first to uncover the mechanism that how these viral elements and cellular factors stabilize viral mRNA and regulate gene viral gene expression. These findings have suggested new drug targets to defeat viral infection.

[REDACTED] briefly discussed the petitioner's original research and subsequent findings. Yet [REDACTED] failed to indicate that the petitioner's original contributions have been of major significance in the field. [REDACTED] for example, failed to indicate the types of "drug targets" that have been developed as a result of the petitioner's research.

Furthermore, the recommendation letters praised the petitioner's research skills. For example, [REDACTED] stated that the petitioner "has consistently shown terrific scientific creativity and extraordinary analytical skills combined with working very hard." However, none of the letters indicated how the petitioner's skills or personal traits are original contributions of major significance to the field. Merely having a diverse skill set is not a contribution of major significance in and of itself. Rather, the record must be supported by evidence that the petitioner has already used those unique skills to impact the field at a significant level in an original way. Furthermore, assuming the petitioner's skills are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment labor certification process. *See Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 221 (Comm'r 1998).

While those familiar with the petitioner's work generally describe it as "outstanding," "extraordinary," and "significant," there is insufficient documentary evidence demonstrating that the petitioner's work is of major significance. This regulatory criterion not only requires the petitioner to make original contributions, the regulatory criterion also requires those contributions to be of major significance. The AAO is not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the petitioner's contributions have already influenced the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The lack of supporting evidence gives the AAO no basis to gauge the significance of the petitioner's present contributions.

Further, USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N

Dec. 500, n.2 (BIA 2008). Thus, the content of the writers' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of *major significance in the field* [emphasis added]." Without additional, specific evidence showing that the petitioner's work has been unusually influential, widely applied throughout his field, or has otherwise risen to the level of contributions of major significance, the AAO cannot conclude that he meets this criterion.

Accordingly, the petitioner failed to establish that he meets this criterion.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The director determined that the petitioner established eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires "[e]vidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media." A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence demonstrating that he minimally meets the plain language of this regulatory criterion.

Accordingly, the petitioner established that he meets this criterion.

B. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence.

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Even if the petitioner had submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small

percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.⁴ Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

⁴ The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).